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Ng Teck Fay v Mahkamah Perusahaan Malaysia & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-690–12 OF 2019
LAU BEE LAN, MOHD SOFIAN AND LEE HENG CHEONG JJCA
1 SEPTEMBER 2021

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Labour Law — Industrial Court — Award — Whether both Industrial Court ('IC') and High Court erred in not holding that employee had been constructively dismissed — Whether company's decision to demote/re-grade employee to position he had never held before in the company was wrong in law — Whether such demotion/downgrading was fundamental breach of employment contract entitling employee to treat himself as constructively dismissed — Whether both IC and High Court erred in taking into account irrelevant considerations and not relevant matters in deciding employee's case — Whether both the courts failed to consider the reason given by the employee in his letter of constructive dismissal and had erroneously presumed a different reason for his walking out of his employment — Whether threatening circumstances under which employee accepted his demotion letter without protest allowed him to dispute it four days later

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After six years of being employed as an assistant general manager (Grade 3) by the second respondent ('the company'), the appellant was suddenly demoted to senior manager (Grade 4) — a post he had never before occupied in the company — and had some benefits taken away because of his job reclassification. The appellant was told that the changes were due to restructuring in the company and that if he was not agreeable to the new terms he could resign. Four days after his demotion came into effect, the appellant informed the company that he considered himself as having been constructively dismissed and walked out of his employment. The appellant lodged a complaint over his dismissal with the Industrial Relations Department. In due course, his compliant came before the Industrial Court ('IC'), by way of Ministerial reference, for adjudication. The IC dismissed the appellant's claim after holding that: (a) the re-grading in his employment did not involve any changes to his salary and seniority; and (b) he had failed to prove on balance of probabilities that the company had committed a fundamental breach of his employment contract that entitled him to consider himself as constructively dismissed. The appellant's application to the High Court by way of judicial review to quash the IC's decision was dismissed. In the instant appeal, the appellant contended that the High Court failed to consider that, inter alia: (i) the company had not shown any justification for conducting the alleged restructuring exercise that brought about his demotion; and (ii) since he had never before been employed as a senior manager (Grade 4) in

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A the company, his demotion to that post was wrong in law and fundamentally altered his employment contract.

Held, unanimously allowing the appeal, setting aside the decisions of the Industrial Court and the High Court and ordering the Industrial Court to B rehear the appellant's case and award him the appropriate remedies:

(1) The appellant had succeeded in proving that his re-grading and demotion breached his contract of employment so fundamentally that he was entitled to consider himself as having been constructively dismissed. The company failed to show that the appellant's dismissal was with just C cause or excuse (see para 46).

(2) Both the Industrial Court and the High Court failed to appreciate that in law, an employee could not be demoted, re-graded or downgraded to a post which he had never held before in the company. The appellant had D never occupied the post of senior manager (Grade 4) and had throughout his employment with the company been an assistant general manager (see paras 36–42).

(3) Both the Industrial Court and the High Court took into account E irrelevant considerations and not relevant considerations when they decided to dismiss the appellant's case. They had regarded the appellant's humiliation and embarrassment over the company's email to all staff informing them that he had been re-graded as the reason why he had considered himself as constructively dismissed, when that was never the F reason he had given in his letter to the company. The very fact that the reason given by the appellant in his letter of constructive dismissal was not properly considered by the Industrial Court was an error of law that should have attracted appellate intervention in the judicial review application (see paras 27–30, 44 & 47).

G (4) Even though the appellant initially accepted his re-grading without objection, he was entitled to change his mind four days later. This was because at the time when he was given his demotion letters at the meeting with the company's human resources general manager in the presence of the group managing director, the appellant was told that if he did not H accept the new terms he had to resign. It was therefore perfectly reasonable for the appellant, confronted with such a threat and being deprived of legal advice and time to consider the new terms, to change his mind four days later (see para 49).

I **[Bahasa Malaysia summary**

Selepas enam tahun bekerja sebagai penolong pengurus besar (Gred 3) oleh responden kedua ('syarikat'), perayu tiba-tiba diturunkan pangkat kepada pengurus kanan (Gred 4) — jawatan yang tidak pernah diduduki dalam syarikat itu — dan faedah-faedah yang diperoleh sebelum ini telah diambil

semula kerana pengkelasan semula tugasnya. Perayu diberitahu bahawa perubahan itu disebabkan oleh penstrukturan semula dalam syarikat dan jika dia tidak bersetuju dengan terma baru dia boleh meletakkan jawatan. Empat hari selepas penurunan pangkatnya berkuat kuasa, perayu memberitahu syarikat itu bahawa dia menganggap dirinya sebagai telah dipecat secara konstruktif dan keluar dari pekerjaannya. Perayu membuat aduan mengenai pemecatannya dengan Jabatan Perhubungan Perusahaan. Kemudiannya, prosiding berlangsung di Mahkamah Perusahaan ('MP'), melalui rujukan Menteri, untuk adjudikasi. MP telah menolak tuntutan perayu selepas mendapati bahawa: (a) pengredan semula dalam pekerjaannya tidak melibatkan apa-apa perubahan kepada gaji dan senioritinya; dan (b) dia telah gagal membuktikan melebihi keseimbangan kebarangkalian bahawa syarikat itu telah melakukan pelanggaran asas kontrak pekerjaannya yang melayakkannya untuk mendakwa dirinya dipecat secara konstruktif ditolak. Permohonan perayu ke Mahkamah Tinggi melalui semakan kehakiman untuk membatalkan keputusan MP telah ditolak. Dalam rayuan ini, perayu berhujah bahawa Mahkamah Tinggi gagal mempertimbangkan bahawa, antara lain: (i) syarikat itu tidak menunjukkan apa-apa justifikasi untuk menjalankan langkah penstrukturan semula yang didakwa membawa kepada penurunan beliau; dan (ii) kerana beliau tidak pernah bekerja sebagai pengurus kanan (Gred 4) dalam syarikat itu, penurunan beliau ke jawatan itu adalah salah dari segi undang-undang dan secara asasnya mengubah kontrak pekerjaannya.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan Mahkamah Perusahaan dan Mahkamah Tinggi serta memerintahkan Mahkamah Perusahaan untuk mendengar semula kes perayu dan membenarkan remedi-remedi bersesuaian:

(1) Perayu telah berjaya membuktikan bahawa pengredan semula pangkatnya telah melanggar kontrak pekerjaannya sehingga pada asasnya dia mempunyai hak untuk menganggap dirinya dipecat secara konstruktif. Syarikat itu gagal menunjukkan bahawa pemecatan dan penurunan pangkat perayu adalah dengan alasan yang adil (lihat perenggan 46).

(2) Kedua-dua Mahkamah Perusahaan dan Mahkamah Tinggi gagal untuk meneliti bahawa menurut undang-undang, seorang pekerja tidak boleh diturunkan, digredkan semula atau diturunkan ke jawatan yang tidak pernah dipegangnya sebelum ini di dalam syarikat. Perayu tidak pernah menduduki jawatan pengurus kanan (Gred 4) dan sepanjang bekerja dengan syarikat itu sebagai penolong pengurus besar (lihat perenggan 36–42).

(3) Kedua-dua Mahkamah Perusahaan dan Mahkamah Tinggi mengambil kira pertimbangan yang tidak relevan dan bukan pertimbangan yang relevan apabila mereka memutuskan untuk mengenepikan kes perayu.

Mereka telah menganggap penghinaan dan rasa malu perayu terhadap emel syarikat itu kepada semua kakitangan yang memberitahu mereka bahawa dia telah digredkan semula sebagai sebab mengapa dia telah menganggap dirinya dipecat sebagai secara konstruktif, apabila perkara tersebut tidak pernah diberikan di dalam suratnya kepada syarikat. Alasan yang diberikan oleh perayu dalam surat pemecatan konstruktif tidak dipertimbangkan dengan betul oleh Mahkamah Perusahaan adalah satu kesilapan undang-undang yang sepatutnya mengundang kepada campur tangan rayuan dalam permohonan semakan kehakiman (lihat perenggan 27–30, 44 & 47).

(4) Walaupun perayu pada mulanya menerima pengredan semula tanpa bantahan, dia berhak mengubah fikirannya empat hari kemudian. Ini kerana pada masa beliau diberi surat penurunan pangkat di dalam mesyuarat dengan pengurus besar sumber manusia syarikat itu di hadapan pengarah urusan kumpulan, perayu diberitahu bahawa jika dia tidak dapat menerima syarat baru yang dia dipaksa meletakkan jawatan. Oleh itu, adalah sangat munasabah untuk perayu, yang menghadapi situasi sedemikian diberikan masa untuk mendapatkan nasihat undang-undang untuk mempertimbangkan terma baru tersebut, dan mengubah fikirannya empat hari kemudian (lihat perenggan 49).]

Cases referred to

Aidiladha bin Sulaiman v Mahkamah Perusahaan Malaysia & Anor [2016] 7 MLJ 333, HC (refd)

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599; [1998] 2 CLJ 197, CA (refd)

Bayer (M) Sdn Bhd v Anwar bin Abd Rahim [1995] MLJU 558; [1996] 2 CLJ 49, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Hussain Sasan Saheb Kaladgi v State of Maharashtra AIR 1987 SC 1627, SC (folld)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577; [2010] 6 CLJ 857, FC (refd)

Nyadar Singh & Anr v Union of India & Ors 1988 AIR 1979, SC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, CA (refd)

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92, SC (refd)

Legislation referred to

Rules of the Court 2012 O 53 r 2

Appeal from: Application for Judicial Review No WA-25–97–02 of 2019 (High Court, Kuala Lumpur)

Jeevaretnam a/l Valautham (Kumarappan a/l Ramasamy with him) for the appellant.
Shariffullah Majeed (Arissa Ahrom with him) for the respondent.

Lee Heng Cheong JCA:

INTRODUCTION

[1] The appellant contended he was constructively dismissed by the second respondent and referred his constructive dismissal to the Industrial Court ('the second respondent') and the chairman of the second respondent ('chairman') after hearing the appellant's reference, handed down Award No 3106 Year 2018 on 3 December 2018 ('the award'), dismissing the appellant's claim.

[2] The appellant then filed an application for judicial review at the Kuala Lumpur High Court for judicial review pursuant to O 53 r 2 of the Rules of the Court 2012 ('the ROC') to quash the award handed down by the second respondent. The application for judicial review was dismissed by the learned High Court judge ('the learned High Court judge'). Hence, this appeal to the Court of Appeal.

[3] For ease of reference, the parties herein will be referred to as they were in the proceedings before this court.

[4] We heard the appeal and after due deliberation and having carefully considered the submissions of both parties, we found that there are merits in the appeal and unanimously allowed the appeal with costs. We propose to give reasons for our decision with respect to the appeal.

THE SALIENT FACTS

[5] The appellant commenced his employment on 11 April 2008 as an assistant general manager with the second respondent at a monthly salary of RM14,000 and a travel allowance of RM1,000. On 11 August 2008, the appellant was confirmed in his position of assistant general manager. His last drawn salary was RM17,150 per month.

[6] As a result of the second respondent's restructuring, the second respondent informed the appellant that with effect from 1 July 2009, he was appointed as the Head of the Family Claims Department and the second respondent maintained the position of the appellant as the assistant general manager.

[7] The appellant was given annual salary increments and bonus throughout his service with the second respondent. In the year 2013 the appellant was nominated by a committee of the second respondent and offered a total of 9,900 ordinary shares in the second respondent.

[8] On 6 May 2014, the appellant received a show cause letter for sending an internal email to the second respondent's third party administration (PM Care). The appellant in his explanation letter, apologised to the second respondent for the oversight of extending an internal email to PM Care.

[9] On 19 May 2014, the appellant received a warning from the second respondent. On the following day, that is 20 May 2014, the second respondent's General Manager of Human Resources informed the appellant that he was required to attend a meeting with the Group Managing Director on 22 May 2014. At the Group Managing Director's office, the General Manager of Human Resources in the presence of the Group Managing Director, handed over two letters both dated 22 May 2014 to the appellant. The Group Managing Director told the appellant that if he did not agree to the contents of the two letters then he can resign.

[10] One of the said letters dated 22 May 2014 which was entitled 'Change of Job Scope', reduced the appellant's scope of duties by taking away, the medical claims for health insurance products from him. As regards the other letter bearing the same date, it was entitled 'Job Regrading to Senior Manager', the second respondent demoted and downgraded the appellant from his position as assistant general manager (Grade 3) to senior manager (Grade 4) with effect from 26 May 2014.

[11] On 30 May 2014, four days after his demotion came into effect, the appellant in his letter bearing the same date, cited constructive dismissal and left the service of the second respondent. He gave the reason for alluding constructive dismissal as he was demoted, re-graded and his benefits were reduced.

[12] The matter was then referred to the second respondent and after hearing the reference, the second respondent delivered and handed down the award, dismissing the appellant's claim.

[13] The appellant then filed an application for judicial review at the High Court and which application was dismissed by the learned High Court judge. Thus this appeal to this court.

FINDINGS OF THE SECOND RESPONDENT

[14] The chairman of the second respondent held inter alia that the re-grading of the appellant did not involve any changes to his salary and seniority. It only involved changes to his benefits arising from the alignment of the appellant's new job grade, scope of work and accountabiIity.

[15] The chairman also found that the appellant had failed to prove on balance of probabilities that the second respondent had breached the relevant terms of his employment contract which goes to the root of the employment contract which entitled him, to consider himself constructively dismissed by the second respondent. Thus, the appellant had on his own accord, abandoned his job.

FINDINGS OF THE HIGH COURT

[16] The learned High Court judge found no grounds for intervention in the exercise of its supervisory function in the judicial review proceeding. The learned High Court judge further held that that second respondent had made findings of facts which it should not readily interfere and dismissed the appellant's judicial review application with costs of RM2,000.

THE APPELLANT'S CONTENTIONS BEFORE THIS COURT

[17] The appellant contended as follows:

(a) that the learned High Court judge failed to consider that the second respondent had allegedly conducted a restructuring/reorganisation exercise without any reason or evidence for the need of the restructuring and that only the appellant was involved in the restructuring exercise;

(b) the learned High Court judge failed to consider that when the appellant commenced his employment with the second respondent, he was holding the position of assistant general manager (Grade 3) and when he was 'demoted' to senior manager (Grade 4), the second respondent had altered his entire employment contract;

(c) the learned High Court judge failed to consider that the second respondent had 'demoted' the appellant from assistant general manager (Grade 3) to senior manager (Grade 4) even though the appellant had never previously held the position of senior manager;

(d) the learned High Court judge had failed to consider the fact that not only was the appellant's job scope reduced but his limit of authority to approve claims was also reduced;

(e) the learned High Court judge failed to consider that the 'demotion' of the appellant's position and grade by the second respondent is in breach of the fundamental terms of his employment contract and the appellant was thereby entitled to consider himself constructively dismissed;

(f) the learned High Court judge failed to accordingly consider that the second respondent's 'unilateral conduct of demoting' the appellant's position and grade was through no fault of the latter;

(g) the learned High Court judge had failed to consider whether the law permits the second respondent to 'demote' the appellant's position and grade (from assistant general manager to senior manager and from Grade 3 to Grade 4) under the pretext of restructuring/reorganisation; and

(h) the learned High Court judge had failed to consider that the second respondent had given the medical claims portfolio, which is the appellant's 'main responsibility' to a new Manager, Sharon Ang.

THE SECOND RESPONDENT'S CONTENTIONS BEFORE THIS COURT

[18] In response, the second respondent contended, inter alia, as follows:

(a) that the learned High Court judge had correctly directed herself in regards to the law and had given due weight to the evidence before reaching its conclusion that the second respondent was correct in arriving at its findings;

(b) the award of the second respondent shows that it had applied trite principles of law and industrial jurisprudence to the facts of the case as meticulously found by it upon a careful evaluation of the evidence adduced;

(c) that the learned High Court judge sitting in a supervisory capacity had correctly refused to interfere with the findings of the second respondent, more so when these findings relate to findings of credibility and evaluation of documentary and oral testimony, which are matters which fall wholly within the purview of the functions of the Industrial Court; and

(d) the appellant has failed to prove that there is any element of illegality or irrationality in the second respondent's award such as to warrant the High Court's intervention by way of judicial review.

THE LAW

[19] It is trite law that the specific finding of facts by the learned High Court judge as a trier of facts should not be disturbed by an appellate court such as this court herein unless that finding was plainly wrong: see *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; [2010] 6 CLJ 857 (FC) paras 41–48;

[20] It is trite law that the specific finding of facts by the learned HCJ as a trier of facts should not be disturbed by an appellate court such as this court herein unless that finding was plainly wrong: see *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; [2010] 6 CLJ 857 (FC) paras 41–48;

[21] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.* (Emphasis added.)

[22] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[23] In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, the Federal Court set out the role of the court in an application for judicial review and the correct test to be applied in reviewing the findings of fact made by the Industrial Court, to be as follows:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. *The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinize the decision not only for process but* also for substance. It allowed the courts to go *into the merit of the matter. Thus, the distinction between review and appeal no longer holds.*

A [16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post Rama Chandran cases have applied some brakes to the courts' liberal approach in Rama Chandran. The Federal Court in the case of *Kumpulan Peransang Selangor Bhd v Zaid Mohd*
B *Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in Rama Chandran may be wholly inappropriate.

[17] The Federal Court, in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004]
C 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, *it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to*
D *the same conclusion.*

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235, *National Union of Plantation Workers v Kumpulan Jerai*
E *Sdn Bhd (Rengam)* [2000] 2 MLJ 144; [2001] 1 CLJ 681, *Quah Swee Khoon v. Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong & Another* [2001] 4 MLJ 97; [2001] 3 CLJ 9. However, there are exceptions to this restrictive principle where:

F (a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached. (See *Swedish Motor Assemblies Sdn Bhd v H Md Ison Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288).

G [19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. *Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review.* (Emphasis
H added)

[24] Bearing in mind, the above principles distilled from the above authorities, we will now consider the appellant's appeal.

I FINDINGS OF THIS COURT

[25] The decision of the High Court in the case of *Bayer (M) Sdn Bhd v Anwar bin Abd Rahim* [1995] MLJU 558; [1996] 2 CLJ 49 which was subsequently upheld by the Court of Appeal in *Anwar bin Abdul Rahim v Bayer*

(M) Sdn Bhd [1998] 2 MLJ 599; [1998] 2 CLJ 197 laid down essentially four conditions that have to be met in order for the appellant to be able to successfully claim constructive dismissal by the second respondent. They are as follows:

(a) there must be a breach of contract by the employer;

(b) that breach must be sufficiently important to justify the employee resigning;

(c) the employee must leave in response to the breach and not for some other unconnected reason; and

(d) the employee must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

[26] It is trite that if an employee leaves the employment of the employer, without the above conditions, being fulfilled, he will be deemed to have resigned and there will be no dismissal within the meaning of the relevant legislation at all. See *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92.

[27] From the grounds of judgment of the learned chairman of the second respondent, we find that the learned chairman of the second respondent erred in law when she took into consideration irrelevant matters and had failed to consider relevant matters when arriving at her decision to dismiss the appellant's case.

[28] The learned chairman of the second respondent held that appellant considered the second respondent's announcement via email dated 26 May 2014 to all staffs of the second respondent was to humiliate the appellant as to the re-grading of his position and that was the reason for the appellant, to consider himself, being constructively dismissed. This is what the learned chairman held at para [60] of the award:

> [60] PYM juga turut menyatakan bahawa tindakan pihak Responden menghantar emel bertarikh 26.05.2014 bagi membuat pengumuman kepada semua pihak di dalam syarikat bertujuan untuk memalukannya kerana pengredan semula jawatan PYM juga telah dimaklumkan. Itulah antara sebab PYM membuat tuntutan pemecatan kerja secara konstruktif.

[29] This finding of the learned chairman of the second respondent is contrary to the evidence adduced as the appellant stated his reason for citing constructive dismissal in his letter dated 30 May 2014 which was sent to the second respondent's General Manager of Human Resources. This is what he said:

> ... I cannot agree to my position to be downgraded from 'Assistant General Manager (Job Grade 3) to 'Senior Manager (Job Grade 4). Furthermore as you are aware the terms and benefits in Job Grade 4 are lower than in Job Grade 3 and therefore I can only conclude that I'm being demoted which I cannot agree.
>
> I will have to view your actions of demoting me as breach of my contract of employment and I have no choice but to leave as I have been deemed to be 'Constructively Dismissed' with immediate effect.

[30] The appellant clearly did not state in his above letter that the reason for him to consider himself as constructively dismissed was because he felt humiliated by the second respondent's action of sending an email to all the staff, announcing that the appellant was demoted to senior manager.

[31] The learned chairman then went on to hold that the appellant failed to prove on the balance of probabilities that the second respondent has breached the fundamental term of the contract of employment.

[32] We find that the learned chairman ought to have considered whether the second respondents act of demoting and re-grading the appellant from the position of assistant general manager (Job Grade 3) to senior manager (Job Grade 4), is a breach of a fundamental term which goes to the root of the appellant's contract of employment. Thus, in this respect, it is our considered view that the second respondent failed to take into account the relevant consideration and acted contrary to the evidence.

[33] In the present appeal, we are of the considered opinion that the second respondent's decision to re-grade the appellant from his post as assistant general manager (Grade 3) to senior manager (Grade 4) with effect from 26 May 2014 in order to align his new job scope with the second respondent's re-organisational structure of the Family Claims portfolio, amounted to a breach of the appellant's employment contract which entitled the appellant to deem himself constructively dismissed despite his acceptance of the second respondent's decision dated 22 May 2014 on 23 May 2014.

[34] In his position as the assistant general manager, the appellant was the head of the Business Unit, Family, Group and Medical Claims. When he was regraded and demoted, the second respondent took away the Medical Claims Administration from his original scope of responsibilities and gave it to one, Ms Sharon Ang who was just employed. This resulted in the appellant, having lesser responsibilities.

[35] Further, when the appellant was demoted to senior manager, the second respondent took away, one deputy manager and one assistant manager from reporting to him. The benefits enjoyed by the appellant were also reduced when he was demoted to senior manager.

[36] The learned chairman of the second respondent and the learned High Court judge, both failed to consider that an employee cannot be demoted (re-graded or whatever name it is called) to a post which he never held before.

[37] We find support for the above proposition of the law in the Supreme Court of *Hussain Sasan Saheb Kaladgi v State of Maharashtra* AIR 1987 SC 1627 where the court, inter alia, stated:

> ... direct recruit to a post, I cannot be gainsaid, cannot be reverted to a lower post. *It is only a promotee who can be reverted from the promotion post to the lower post from which he was promoted.* These proposition are so elementary that the same are incapable of being disputed and have not been disputed. (Emphasis added.)

[38] In another Indian Supreme Court case of *Nyadar Singh & Anr v Union of India & Ors* 1988 AIR 1979, which involved an imposition of a penalty of reduction in rank, reducing the petitioner from the post of assistant locust warning officer to which he was recruited directly on 31 October 1960 to that of a junior technical assistant. The court held for the appellant, by setting aside the penalty of reduction in rank and restoring him to the original position and stated as follows:

> A person initially recruited to a higher time scale grade or service or post cannot be reduced by way of punishment, to a post in a lower time scale grade or service or post which he never held before.

[39] The above two cases were adopted with approval by our High Court in the case of *Aidiladha bin Sulaiman v Mahkamah Perusahaan Malaysia & Anor* [2016] 7 MLJ 333.

[40] In the present appeal, the appellant joined the second respondent, six years before his regrading to a senior manager. After performing his duties as an assistant general manager for that many years, he was suddenly instructed to assume the post of senior manager, a post he never held before.

[41] The above proposition of the law clearly applies here and both the learned High Court judge and the learned chairman of the first respondent erred when they failed to take into consideration this relevant piece of evidence in their decision making process ie that from the time the appellant joined service he was an assistant general manager and never held the position of senior manager.

[42] The learned chairman failed to consider the principle of law that the appellant cannot be reverted to a position he never held before in the company.

[43] In the English case of *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713, Lord Denning MR held, inter alia, in relation to constructive dismissal as follows:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

[44] In the light of the above, we are of the considered opinion that there was insufficient judicial appreciation of the totality of the evidence by the second respondent and the learned High Court judge. The very fact that the reason proffered by the appellant in his letter of constructive dismissal was not property considered constitutes error of law that attract appellate intervention in the form of judicial review.

[45] The chairman of the second respondent accorded unjustifiable emphasis to the humiliation suffered by the appellant and that the appellant's actions does not qualify him to consider himself as constructively dismissed. This constituted an error of law as the contract test as laid down in the Supreme Court's case of *Wong Chee Hong* has stated that relegation of responsibility with its consequent humiliation and frustration and loss of estimation amongst his fellow employees entitles the appellant to walk out of his employment and consider himself, as constructively dismissed.

[46] We find that the appellant in this case succeeded in proving that his regrading and demotion was a breach of his contract of employment and that he had correctly treated such regrading and dismissal as constructive dismissal. We further find that the second respondent had failed to show that the dismissal of the appellant, was with a just cause or excuse.

FINDINGS OF THE HIGH COURT

[47] Further we are of the considered view that learned High Court judge in her grounds of judgment also took into account irrelevant consideration such

as the email dated 26 May 2014, harassment, the appellant's embarrassment and humiliation as the grounds relied upon by the appellant, for constructive dismissal. The learned High Court judge clearly failed to take relevant considerations such as the appellant's letter dated 30 May 2014 to the second respondent's General Manager of Human Resources, informing that the reason why he considered himself, constructively dismissed is because he was regraded and demoted from an assistant general manager to a senior manager. The appellant repeated the reasons for his constructive dismissal in his witness statement in the proceedings before the second respondent.

[48] Having examined the records of appeal, we are of the respectful view that the appellant succeeded in proving that he was constructively dismissed by the second respondent and that he has fulfilled the four conditions laid down by *Bayer (M) Sdn Bhd v Anwar bin Abd Rahim* and upheld by the Court of Appeal in *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd.*

[49] Even though the learned High Court judge found that the appellant had accepted without objection of the new re-grading on 23 May 2014, we find that the appellant is entitled to change his mind bearing in mind that at the meeting with the second respondent's General Manager of Human Resources in the presence of the Group Managing Director, the appellant was threatened that either he accepted the re-grading or resign. We further find that that it is perfectly reasonable for the appellant, after being confronted with such threats and being deprived of legal advice and time to consider the offers, was entitled to change his mind, four days later.

[50] Even though the second respondent contended that before and after 2014, the following officers of the second respondent were re-graded:

(a) Encik Mathews George was re-graded from assistant general manager (Grade 3) to senior manager (Grade 4);

(b) Encik Azhar Tahir was re-graded from senior manager (Grade 4) to Manager (Grade 5);

(c) Puan Nik Anum was re-graded from Deputy Manager (Grade 6) to Assistant Manager (Grade 7); and

(d) Puan Mahanim Mahmud was re-graded from senior manager (Grade 4) to Manager (Grade 5).

We find that the appellant was the only officer who was regraded during that particular re-organisational exercise.

A CONCLUSION

[51] Premised on the reasons enumerated above, we find that there are merits in the appeal which warrants appellate intervention and the appeal is allowed with costs. In the premises, we order that judgment be entered against the defendant in the following terms:

B

(a) the appeal against the order of the Kuala Lumpur High Court for Judicial Review Application No WA-25–97–02 of 2019 dated 21 November 2019 is allowed with costs of RM15,000 to be paid by the second respondent to the appellant, being costs here and below;

C

(b) an order of certiorari is issued to quash the decision of the second respondent vide Award No 3106 of 2018 dated 3 December 2018 in Kes Mahkamah Perusahaan Malaysia No 5/4–1111 of 2015;

D

(c) an order of mandamus is issued to the second respondent to hear the case and to award the appropriate remedies in respect of Kes Mahkamah Perusahaan Malaysia No 5/4–1111 of 2015; and

(d) the decisions of the Industrial Court dated 3 December 2018 and the High Court dated 21 November 2019 are set aside.

E

Appeal allowed.

Reported by Ashok Kumar

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